No. (2) 99-5746

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

LONNIE WEEKS, JR.,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

Supreme Court, U.S.
FILED
AUG 16 1999
OFFICE OF THE CLERK

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Imminent Execution Scheduled
September 1, 1999

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45 pp

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

COMES NOW petitioner Lonnie Weeks, Jr., a prisoner currently scheduled to be executed on September 1, 1999, by counsel, and pursuant to Rule 39 of the Rules of the United States Supreme Court, moves the Court for leave to proceed *in forma pauperis*. In support of the Motion Mr. Weeks states as follows:

1. Mr. Weeks has been convicted of capital murder and is scheduled to be executed on September 1, 1999.

2. Mr. Weeks is petitioning the Court to grant a writ of certiorari.

3. Mr. Weeks previously sought leave to proceed *in forma pauperis* in the United States District Court for the Eastern District of Virginia, and he received such leave by Order dated August 15, 1996. A copy of the affidavit Mr. Weeks filed with the District Court is attached hereto as Exhibit A.

4. Thereafter, the United States District Court for the Eastern District of Virginia appointed counsel for Mr. Weeks pursuant to 21 U.S.C. § 848(q)(4)(B) and 28 U.S.C. § 1915 by Order dated September 19, 1996. Pursuant to Rule 39 of the Rules of the Supreme Court, by virtue of this appointment Mr. Weeks need not submit a further affidavit or declaration in support of his Motion.

WHEREFORE, petitioner Lonnie Weeks, Jr., by counsel, prays that the Court grant his Motion for Leave to Proceed *In Forma Pauperis*.

LONNIE WEEKS

Of Counsel

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

LONNIE WEEKS, JR. Petitioner, v. J.D. NETHERLAND, Warden, Mecklenburg Correctional Center, Boydton, Virginia, Respondent.	)	No. 2:96cv829 /HH POST-CONVICTION PROCEEDING

AFFIDAVIT OF LONNIE WEEKS, JR.

* * * * * * * * * * * * * *

I am Lonnie Weeks, Jr., and this is my affidavit.

1. I am the petitioner in the case of Lonnie Weeks, Jr. v. Netherland, a post-conviction proceeding from a judgment of a state court sentencing me to death, and I believe that I am entitled to redress.

2. I am presently incarcerated at Mecklenburg Correctional Center, Boydton, Virginia. I am not employed.

3. Because of my poverty, I am unable to pay the costs of this case or to give security therefor, and I believe that I am entitled to proceed *in forma pauperis*.

4. In the past twelve months, I have not received any income from businesses, professions, or any other source.

5. My cash assets are $ 0 .

6. I own no real estate, stocks, bonds, automobiles, or other valuable property.

EXHIBIT
A

7. I have no dependents.

8. I understand that a false statement in this affidavit will subject me to penalties for perjury.

Petitioner Lonnie Weeks, Jr.
Mecklenburg Correctional Center
P.O. Box 500
Boydton, Virginia 23917

Sworn and subscribed to before me on 12th day of August, 1996.

My commission expires: Embossed Heron is My Commonwealth of Virginia Notary Public Seal My Commission Expires February 28, 1999 JUDY V. BIGGER

Judy V. Bigger
Notary Public

State Virginia
County - Mecklenburg

99-5146

No.

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Capital Case

QUESTIONS PRESENTED

1. When a capital sentencing jury informs the judge that it does not understand the sentencing instructions held facially constitutional in *Buchanan v. Angelone* and specifically asks whether it is free to consider a sentence less than death if it finds one or more aggravating factors, is the judge constitutionally required to clarify that a death sentence is not mandatory upon the finding of an aggravating factor but that the jury should consider mitigating evidence as well in making its sentencing decision?

2. Did the Fourth Circuit err in holding that it would announce a new rule, in violation of *Teague v. Lane*, if this Court's decisions in *Ake v. Oklahoma*, *Caldwell v. Mississippi*, and *Britt v. North Carolina* were read to require state courts to provide indigent criminal defendants with the assistance of experts in fields other than psychiatry?

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PETITION FOR A WRIT OF CERTIORARI

Imminent Execution Scheduled
September 1, 1999

Lonnie Weeks, Jr., a Virginia inmate under sentence of death, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the district court's denial of Weeks' petition for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Weeks v. Angelone*, 176 F.3d 249 (4th Cir. 1999), and is reprinted in the accompanying Appendix ("App.") at pages 1 through 26. The opinion of the district court is reported at *Weeks v. Angelone*, 4 F. Supp.2d 497 (E.D. Va. 1998), and is reprinted at pages 27 through 70. The opinion of the Virginia Supreme Court on direct review is reported at *Weeks v. Commonwealth*, 450 S.E.2d 379 (Va. 1994), and is reprinted at pages 71 through 83.

JURISDICTION

The court of appeals issued its judgment and decision on May 10, 1999. Weeks filed a timely petition for rehearing and suggestion for rehearing *en banc* on May 21, 1999. The court of appeals denied the petition for rehearing on June 4, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the United States Constitution, which provide in relevant part as follows:

> [N]or [shall] cruel and unusual punishments [be] inflicted. U.S. CONST. amend. VIII.
>
> No State shall . . . deprive any person of life [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

A. The Crime and the Trial

On February 24, 1993, Lonnie Weeks, Jr. was a passenger in a speeding car traveling southbound on Interstate Route 95 in Northern Virginia. A State Trooper pulled the vehicle over on an off-ramp in Prince William County. The Trooper approached and stood near the rear driver's side of the car, and he directed Weeks to get out of the passenger side of the vehicle. After Weeks stepped from the car, he shot the Trooper more than once in rapid succession while standing near the car's front passenger door. The Trooper died as a result of at least one of the gunshot wounds. Weeks was subsequently arrested and charged with the capital murder of a law enforcement officer in the performance of his duties. VA. CODE §18.2-31(6).

Weeks admitted causing the Trooper's death, but he pleaded not guilty to capital murder on the ground that he did not act with premeditation. In support of this theory, and also to support his penalty-phase arguments, Weeks moved the trial court to appoint an independent pathologist and a firearms expert to assist the defense. The trial court denied this motion.[1] The jury returned a verdict of guilty of capital murder.

---

[1] The court's stated reason for denying Weeks' motion was that pathologists and firearms experts deal with issues of fact on which experts do not differ, rather than issues of opinion; in the court's view, independent experts appointed to assist the defense therefore would not reach any different conclusion than the prosecution's experts. (Record on Appeal to the United States Court of Appeals for the Fourth Circuit ("R.") at 641- 43.) Weeks notes that regardless of its reasons, the Circuit Court of Prince William County did not grant independent experts in any field — except for mental health experts whose appointment is mandated by statute — in any of the 10,000 felony cases that it processed between 1985 and 1995. Testimony to this effect was presented by Richard Conway, an Assistant Commonwealth's Attorney in Prince William County, on behalf of the Commonwealth in *Smith v. Angelone*, No. 93CV710 (E.D. Va. Nov. 8, 1995). Weeks has lodged a copy the transcript of Conway's testimony with the Court.

In the penalty phase, Weeks presented evidence in mitigation. In addition to his own testimony, Weeks offered testimony from family, church members, and friends regarding his personal history and character. After presenting this evidence, Weeks proffered instruction C1 and asked that the jury be instructed, in addition to Virginia's pattern capital sentencing instruction, as follows:

> Even if you find that the Commonwealth has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the Defendant to life in prison.

(App. at 85.) The trial court denied the instruction. (R. at 1254-55.) Instead, the court provided the jury with four brief instructions regarding their duties in assessing Weeks' sentence. (App. at 86-89.) Only one of those instructions, Instruction #2, described the process by which jurors were to arrive at a sentence selection determination. That pattern instruction, which this Court found to be facially constitutional in *Buchanan v. Angelone*, 118 S. Ct. 757 (1998), reads, in pertinent part, as follows:

> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt, either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death; or, if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment, or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.

(App. at 87.)

This instruction correctly shows that Virginia is a nonweighing state in which the sentencer must make two independent determinations — death eligibility and sentence selection — in sequence:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal

> acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim [*death eligibility decision*]; and (2) recommend that the penalty of death be imposed [*sentence selection decision*].

VA. CODE § 19.2-264.2. The pattern instruction also reflects the fact that Virginia juries are constitutionally required to consider mitigating evidence in making each of these determinations. *See, e.g., Tuggle v. Netherland*, 516 U.S. 10, 14 (1995) (per curiam) (holding that trial court's failure to appoint psychiatrist to develop mental health mitigating evidence deprived Virginia defendant not only of ability to rebut state's evidence of future dangerousness, but also "may well have affected the jury's ultimate decision, based on all of the evidence before it, to sentence petitioner to death rather than life imprisonment").

Weeks' jury was given a written copy of the instructions as well as the verdict form to take with them and consult during deliberations.

Eighty minutes after the jury retired to deliberate on Weeks' sentence, it sent out a written question asking whether a sentence of life imprisonment would include the possibility of parole. (R. at 1340.) The trial court refused to answer this question, instead advising the jury that it should "impose such punishment as you feel is just under the evidence, and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards." (App. at 90; R. at 1340.) The jury returned to its deliberations.

After almost three more hours of deliberation, the jury sent out a second written question expressing confusion about the sentencing instruction:

> If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the aggravating alternatives, then is it our duty as a jury to issue the death penalty? or must we decide (even though he is guilty of 1 of the alternatives) whether or not to issue the

death penalty, or one of the life sentences? What is the rule? Please clarify.

(App. at 91; R. at 1342 (emphases in original.) This question indicates that some of the jurors harbored as many as three misconceptions about the capital sentencing instruction: (i) that they had a duty to sentence the defendant to death as soon as they found him eligible for death; (ii) that the evidence they heard about Weeks' background and character was relevant only to the determination of death eligibility based on future dangerousness — an aggravating factor that they did not find; and/or (iii) that because they had a duty to impose death after they found that the crime was vile, there was no need to engage in sentence selection and to consider whether the mitigating evidence might counsel in favor of a life sentence.

Although pattern instruction #2 presented a simple decisional tree that ordinary jurors ought to be able to follow, the jurors in Weeks' case exhibited clear lack of understanding about whether they were duty-bound to issue the death penalty once they determined that Weeks was eligible for death or, instead, whether they were supposed to go on to consider all of the evidence (including the mitigating evidence) and to select the appropriate punishment from among all of the sentencing options.

At this point, Weeks' trial counsel renewed his request that the jury be given proposed instruction C1, which said in simple and straightforward language that the jurors could impose a life sentence even if they found an aggravating factor. (R. at 1344.) The trial court denied this request. The court also refused to give the jurors any further concrete guidance or clarification of the rule. Instead, the trial judge wrote on the bottom of the jury's inquiry: "see second paragraph of instruction #2, (Beginning with 'If you find from . . .')." (App. at 91.) The jury then returned to its deliberations.

A little over two hours after expressing its confusion over the sentencing instruction, the jury fixed Weeks' sentence at death based on the sole aggravating factor that the crime was outrageously or wantonly vile, horrible or inhuman. (R. at 1346.) The transcript records that "a majority of the jury members [were] in tears" as they delivered their sentence. (R. at 1346.)

B. <u>The Direct Appeal</u>

Weeks alleged on appeal that the trial court's refusal to appoint necessary experts to assist an indigent defendant violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution. As the United States Court of Appeals for the Fourth Circuit later agreed, Weeks properly presented this issue; the Virginia Supreme Court simply failed to address it. (App. at 14.) *See Smith v. Digmon*, 434 U.S. 332 (1978) (per curiam) (claim is ripe for federal collateral review even if "state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court").

Weeks also alleged on direct appeal that his rights under the Eighth and Fourteenth Amendments were violated by the trial court's refusal to clarify the capital sentencing instruction after the court received a specific jury request to decipher the rule of law. Weeks argued that as a result of this error, there was a reasonable probability that the jury did not engage in the sentence selection process and therefore did not have an opportunity to consider relevant mitigating evidence in determining the appropriate punishment. Without any discussion of the pertinent facts or the governing law, the Virginia Supreme Court dismissed this claim as having "no merit." Following the state court's affirmance of the conviction and death sentence, *Weeks v. Commonwealth*, 450 S.E.2d 379, 383, 390 (Va. 1994), this Court denied certiorari, *Weeks v. Virginia*, 516 U.S. 829 (1995).

C. Federal Habeas Corpus Proceedings

After exhausting state remedies, Weeks filed his federal habeas petition on February 7, 1997. In that petition Weeks renewed his claim that the trial court violated his Eighth and Fourteenth Amendment rights by refusing to appoint an independent pathologist and firearms expert. The court of appeals concluded correctly that this claim is not subject to deferential review under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), because the claim "was [not] adjudicated on the merits in state court proceedings." (App. at 14.) The appellate court held, however, that for a habeas court to recognize any constitutional right to such experts for indigent defendants would violate the antiretroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989). (App. at 17-18.) The court of appeals gave two reasons.

First, it held that the right to expert assistance articulated in *Ake v. Oklahoma*, 470 U.S. 68 (1985), was narrowly limited to the appointment of a psychiatrist when an indigent defendant "demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial." (App. at 79 (*quoting Ake*, 470 U.S. at 83.)) The court of appeals acknowledged that the government, on request, must provide indigent criminal defendants with the "basic tools of an adequate defense," *Britt v. North Carolina*, 404 U.S. 226, 227 (1971) but held that neither *Britt* or *Ake* compelled the state to provide the assistance of any kind of expert other than a psychiatrist. (App. at 16-17.)

Second, the court of appeals rejected Weeks' assertion that the state court would have recognized a federal constitutional right to a pathologist and a firearms expert if the state court had addressed this issue when Weeks presented it on direct appeal. (App. at 17-18.) Weeks' argument was based on the fact that one year after his direct appeal, the Virginia Supreme Court *did* address

this issue. In *Husske v. Commonwealth*, 476 S.E.2d 920 (Va.1996), *cert. denied*, 519 U.S. 1154 (1997), an indigent defendant alleged that the trial court had violated his Eighth and Fourteenth Amendment rights by refusing to grant his motion for an independent DNA expert. The state court held that:

> *Ake* [*v. Oklahoma*, 470 U.S. 68 (1985),] and *Caldwell* [*v. Mississippi*, 472 U.S. 320 (1985)], when read together, require that the Commonwealth of Virginia, upon request, provide indigent defendants with "the basic tools of an adequate defense," *Ake*, 470 U.S. at 77, and, that in certain instances, these tools may include the appointment of non-psychiatric experts.

Husske, 476 S.E.2d at 925 (Va. 1996).

Before the Virginia Supreme Court reached the decision in *Husske*, the court surveyed the decisions of other courts, both state and federal, and concluded that "most courts which have considered the question . . . have held that the Due Process and Equal Protection clauses require the appointment of non-psychiatric experts to indigent defendants" upon a showing of need. *Id.* The state court further clarified that its decision did not break new ground. Instead, the decision upheld the trial court's denial of experts on prior occasions only because the defendants in those cases "failed to make the requisite particularized showing of the need for the requested expert assistance." *Husske*, 476 S.E.2d at 926.

Weeks argued below that although *Husske* was decided a year after his conviction became final, the legal landscape did not change one whit during that interval, and *Husske* was thus a good proxy for what the state court would have concluded if it had addressed the issue when Weeks presented it on direct appeal. *See Lambrix v. Singletary*, 520 U.S. 518, 536-37 (1997) (describing later-decided case as "a particularly good proxy" for what reasonable jurists would have concluded four years previously). The federal court of appeals insisted, however, that even if the Virginia

Supreme Court had been "convinced after canvassing cases from other courts that such experts may be required in certain cases," (App. at 17), the state court had not been *compelled* to reach that decision by existing precedent.[2]

Weeks also renewed in federal court his claim that the trial court had a duty under the Eighth and Fourteenth Amendments to clear up the jury's expressed confusion about the law governing the selection of the appropriate sentence. Weeks argued that even if the pattern jury instruction was unambiguous on its face, the trial court was required under the circumstances to give a clarifying instruction rather than merely telling the jurors to reread the very instruction that was the source of their confusion — especially when the jury had pored over the written instruction for hours before sending out its inquiry. Weeks further argued that the jurors would not have sent out this question unless some of them were genuinely confused about their obligation. *See Simmons v. South Carolina*, 512 U.S. 154, 170 n.10 (1994) (opinion of Blackmun, J.) ("It almost goes without saying that if the jury in this case understood . . . the 'plain meaning' [of the terms in the instruction] there would have been no reason for the jury to inquire [as to their meaning]"); *id.* at 173 (Souter, J., concurring) ("It is . . . clear that at least one of these particular jurors did not understand the meaning of the term, since the jury sent a note to the judge asking [the court to define the term]"); *id.* at 198 (O'Connor, concurring) ("that the jury in this case felt compelled to ask" about the meaning of the terms in the instruction "shows" that the jurors did not understand the term).

The court of appeals denied Weeks' claim, relying upon the holdings and analyses in

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[2]The federal court of appeals also rejected Weeks' argument that an indigent defendant's right to nonpsychiatric experts comes within the "watershed" exception to the new rule doctrine because it would be fundamentally unfair to conclude that psychiatrists are a basic tool of an adequate defense while nonpsychiatric experts are not. (App. at 18.)

Buchanan v. Angelone, 118 S. Ct. 757 (1998), and *Boyde v. California*, 494 U.S. 370 (1990). First, the court of appeals apparently concluded that because the pattern instruction is unambiguous on its face, "no reasonable juror would have understood the sentencing instruction to preclude the consideration of mitigating evidence even upon a finding of an aggravating factor." (App. at 13.) The Fourth Circuit was untroubled by the jurors' written question indicating that some members of the jury believed they had a "duty" to impose a capital sentence immediately upon finding that Weeks was eligible for death, and that these jurors misconstrued the pattern instruction as precluding them from considering mitigating evidence or imposing a life sentence:

> "The instruction did not foreclose the jury's consideration of any mitigating evidence. By directing the jury to base its decision on "all the evidence," the instruction afforded jurors an opportunity to consider mitigating evidence. The [pattern] instruction informed the jurors that if they found the aggravating factor proved beyond a reasonable doubt then they 'may fix' the penalty at death, but directed that if they believed that all the evidence justified a lesser sentence then they 'shall' impose a life sentence. The jury was thus allowed to impose a life sentence even if it found the aggravating factor proved."

(App. at 12 (quoting *Buchanan*, 118 S. Ct. at 762.))

The court of appeals further reasoned that because Weeks, like Buchanan, had presented evidence about his background and character, the jury must have known that it was required to consider this evidence *after* it concluded that Weeks was eligible for death. "[W]e think it unlikely that reasonable jurors would believe the court's instructions transformed all of this favorable testimony into a virtual charade." (App. at 13 (quoting *Boyde*, 494 U.S. at 383 (internal quotation marks omitted)).[3] Lastly, the court of appeals noted that on the preprinted verdict form, the jurors

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[3]The jury may well have thought that the evidence about Weeks' background and character was offered only to rebut future dangerousness — an aggravating factor that the state sought but the jury did not find. This unconstitutionally limited view of the function of mitigating evidence

indicated that they had sentenced Weeks to death after considering mitigating evidence.[4] (App. at 13.)

The court of appeals affirmed the denial of the writ on May 10, 1999. Weeks timely moved for rehearing, which the court denied on June 4, 1999. On July 7, 1999, the Circuit Court of Prince William County issued an order that Weeks be executed on September 1, 1999.

in Virginia's capital sentencing scheme would be consistent with the notion expressed in the jurors' question that if they found Weeks eligible for death because the crime was vile, there was nothing left for them to do but to impose the death sentence.

[4]By statute, *every* sentencing option on the preprinted verdict form must indicate that the jurors have considered evidence in mitigation of the offense. VIRGINIA CODE § 19.2-264.4(B). Thus, Weeks' jury had no choice but to indicate that it considered mitigating evidence, regardless whether this was true. Moreover, if the jurors viewed the evidence of Weeks' background and character as relevant solely to the rebuttal of future dangerousness, they could truthfully state that they considered the mitigating evidence — even if they did not engage in the required sentence selection process.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S ARTICULATION OF THE STANDARD FOR RESPONDING TO JUROR CONFUSION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENTS

It is axiomatic that real jurors do not all think like hypothetical jurors. *See Francis v. Franklin*, 471 U.S. 307, 342 (1985) (Rehnquist, J., dissenting) (distinguishing between understandings of hypothetical jurors and real jurors). Thus, even when a particular jury instruction is facially unambiguous — meaning that there is no reasonable likelihood a hypothetical juror would apply the instruction in an unconstitutional manner — real jurors in an individual case may find the instruction incomprehensible and ask the trial court for clarification.

Jury misunderstanding, even of technically flawless pattern instructions, is alarmingly common.[5] In light of the frequency with which jurors misunderstand facially unambiguous instructions, Weeks' case presents an issue of special and recurring importance to the administration of justice.

How should trial courts respond when jurors ask for clarification of an instruction that ought to be perfectly clear? In Weeks' case, the Fourth Circuit held that when the jury requests

[5]*See, e.g.*, Peter M. Tiersma, *Reforming the Language of Jury Instructions*, 22 Hofstra L. Rev 37 (1993) (reviewing studies showing that many jurors fail to comprehend technically flawless instructions); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 Psychol. Pub. Pol'y & L. 589, 596-97, 613-16 (1997) (noting that jurors have difficulty comprehending facially unambiguous instructions 30 percent of the time and that lack of comprehension is even higher for death penalty instructions); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 Buff. L. Rev 339, 360 (1996) (reporting that in spite of instructions, nearly one-third of jurors in capital cases were under mistaken impression that law required them to impose death sentence if they found an aggravating factor).

clarification of a facially unambiguous instruction, the appropriate response is simply to refer the jurors back to that instruction. (App. at 13.) The court of appeals reasoned that if an instruction is unambiguous on its face, jurors simply will not misunderstand it, notwithstanding their written professions of confusion. (App. at 12-13.) The Sixth, Ninth, and Tenth Circuits disagree. When jurors send out a question that expresses an inability to understand a technically flawless instruction, these courts take the jurors at their word and require the trial judge to clear away the jury's confusion "with concrete accuracy," *Bollenbach v. United States*, 362 U.S. 607, 612-13 (1946), just as if the instruction was defective on its face. Other courts take a case-by-case approach, taking into consideration factors such as the nature of the question, the complexity of the original instructions, and the jurors' ability to review the instruction during their deliberations.[6]

Because lay jurors frequently misunderstand clear instructions, this is a recurring problem of constitutional dimension, and this Court should grant certiorari to resolve the correct standard.

A. The Fourth Circuit's Decision Directly Conflicts with a Recent *En Banc* Decision of the Ninth Circuit and Is Inconsistent with Decisions of the Sixth and Tenth Circuits and the Decisions of the Highest Courts of Several States

The Fourth Circuit, like the trial court, undertook no analysis of the jurors' question. (App. at 12-13.) Rather, the Fourth Circuit concluded that when an instruction is complete, accurate, and unambiguous, the trial court *per se* acts appropriately when it answers the jurors' query simply by

[6]Factors that courts have taken into consideration in deciding whether or not it is sufficient just to reread the original instructions include whether the jurors already had received a written copy of the instructions to consult during deliberations, *see, e.g., United States v. Span*, 170 F.3d 798 (7th Cir. 1999); whether the jurors' question indicated that they had gotten sidetracked by an extraneous issue, *see, e.g., United States v. Mann*, 161 F.3d 840, 863 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1766 (1999); and whether the original instructions were so long and complex that the jurors may have failed to focus on the portion of the instructions that answered their question.

referring them back to that instruction. Applying principles of ratiocination, the court of appeals held that there was no reasonable likelihood that a hypothetical jury would apply the original instruction in an unconstitutional manner; ergo, there was no reasonable likelihood that the jurors in Weeks' case applied the instruction in an unconstitutional manner. (App. at 13.)

In a strikingly similar case, the *en banc* Ninth Circuit reached the diametrically opposite conclusion. *See McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 1575 (1998). McDowell, like Weeks, was a capital defendant. McDowell, like Weeks, presented mitigating evidence at the penalty phase of his capital trial. McDowell's jury, like Weeks' jury, was given technically flawless instructions regarding the process for determining whether the defendant should be sentenced to death.[7] During the penalty phase deliberations, McDowell's jury, like Weeks' jury, sent out a note revealing confusion and disagreement about whether it was permitted to consider the mitigating evidence presented by the defense. *Id.* at 835. McDowell's trial court, like Weeks' trial court, did not directly answer the jurors' questions; it merely referred the jurors back to the original instructions.

In federal habeas proceedings, the *en banc* court in *McDowell* acknowledged this Court's consistent refusal to tolerate any barrier to the sentencer's consideration of mitigating evidence, regardless whether that barrier is interposed by statute, *Lockett v. Ohio*, 438 U.S. 586(1978); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); by jury instructions, *Penry v. Lynaugh*, 492 U.S. 302,

[7]McDowell did not raise a facial objection to the instruction in his case, which was the same instruction that this Court approved in *Boyde v. California*, 494 U.S. 370 (1990). Weeks *did* make a facial objection to the sentencing instruction in his case, but he did not pursue that error after this Court approved the identical instruction in *Buchanan v. Angelone*, 118 S. Ct. 757 (1998).

319 (1989); *Mills v. Maryland*, 486 U.S. 367 (1988); by an evidentiary ruling, *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Green v. Georgia*, 442 U.S. 95, 99 (1979); by prosecutorial argument, *Penry*, 492 U.S. at 326; or by the sentencing court's misunderstanding of a state statute, *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The *McDowell* court then concluded:

> The jury's mistake and confusion in the instant case communicated to the judge in its note fit squarely withing the teaching of *Lockett* and *Eddings*. Although the jurors had been properly instructed, the understanding of eleven of them — shades of *Eddings* — was "as if the trial judge had instructed [them] to disregard the mitigating evidence [McDowell] proffered on his behalf."

Id. at 837 (citations omitted). Calling upon this Court's admonition in *Bollenbach v. United States*, 362 U.S. 607, 612-13 (1946), that when the "jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy," the Ninth Circuit found the trial court's response to the jury's confusion was constitutionally insufficient to dispel the possibility that the jury would sentence McDowell to death without considering relevant evidence. *Id.* at 837- 41.

Addressing the trial court's mere referral to the original instructions, the Ninth Circuit reasoned that when a jury has failed to understand the instructions in the first instance, "it would be folly to presume . . . that in the end they got it right and followed the law." *Id.* at 839. Thus, the failure to correct the jury's obvious misunderstanding of a critical rule of law left a reasonable likelihood that the jury had incorrectly interpreted its instructions so as to preclude consideration of mitigating evidence. *Id.* at 841.

The Sixth and Tenth Circuits agree with the Ninth Circuit.[8] On direct appeal in a noncapital

[8] *See also, United States v. Bolden*, 514 F.2d 1301, 1308 (D.C. Cir. 1975) (pattern instruction "was not meant to be and is not an inflexible directive to be followed by rote"; where jury indicates that it does not understand pattern instruction, court must provide additional instruction).

case, the Sixth Circuit articulated the same general standard as the Ninth Circuit. In *United States v. Combs*, 33 F.3d 667 (6th Cir. 1994), the defendants were charged with kidnaping (count 1) and depriving the victim of his civil rights by kidnaping him (count 4). After the trial court gave the jury instructions that correctly and adequately represented the law, the jurors sent out a note stating, "We need further clarification on Count 4. Is Count 4 specific to which civil right was violated? Must it be dependent on Count 1." In response to the jury's first query, "the court wrote, 'Yes. Please refer to Jury Instructions #25(6) at pages 23-24, and to Count 4 of the Indictment.' In response to the second question, the court simply wrote 'No.'" *Id.* at 668-68.

Addressing the defendants' argument that a trial court, faced with juror confusion, must do more than merely repeat its original instructions, the Sixth Circuit emphasized that when the jury sends out a note indicating confusion over "'an important legal issue,' the district court abuses its discretion by not clarifying the issue." *Id.* at 669 (citing *United States v. Nunez*, 889 F.2d 1564, 1568 (6th Cir. 1989)).

> Upon receipt of questions from a deliberating jury, it is incumbent upon the district court to assume that at least some jurors are harboring confusion, which the original instructions either created or failed to clarify. Therefore, the trial judge must be meticulous in preparing supplemental instructions, taking pains adequately to explain the point that obviously is troubling the jury. To be sure, the court must ensure that, in responding, it does not stray beyond the purpose of jury instructions, but the jury's questions here did not seek collateral or inappropriate advice.

Id. at 670.

The same rule applies in the Tenth Circuit. In *United States v. Brown*, 943 F.2d 1246 (10th Cir. 1991), an associate at a law firm was charged with conspiring to defraud the United States by

concealing the financial transactions of two of the firm's clients.[9] After three days of deliberation, the jury sent out a note containing the following questions:

> If a person observes an act that is obviously, to him or her, a crime, (1) does the observer have a legal responsibility to report the crime; (2) does the observer have a legal responsibility to intervene to stop it; (3) does failure to report or otherwise intervene make the observer a participant or in any way responsible?

Id. at 1256. Concluding that "the jury's questions went to the 'heart of the conspiracy concept' and that the jury instructions as a whole adequately addressed the questions posed," *id.*, the trial court declined to give any additional instruction. The court of appeals reversed, holding that because "the jury may have been confused, [it may have] convicted appellant on an improper basis. It was plain error not to resolve or attempt to resolve the jury's confusion." *Id.; see also United States v. Zimmerman*, 943 F.2d 1204 (10th Cir. 1991) (same).

The highest courts of several states similarly follow the rule articulated by the Sixth, Ninth, and Tenth Circuits. In *Leonardo v. People*, 728 P.2d 1252 (Colo. 1986), for example, the jury was instructed that the defendant could be convicted of theft by receiving only if he acted while "knowing or believing" that the thing of value in question had been stolen. The court further gave a pattern definition of the term "knowingly." When the jury sent out a note asking "Is Knowing or Believing in instruction Number 6 The Same as Having a Suspicion of?" the court responded, "You must reach your verdict applying the words as you find them in the instructions." *Id.*

Reversing the intermediate appellate court's affirmance of this conviction, Colorado's highest court explained that although the instructions given by the trial court were clear and correct:

> The issue in this case is not the adequacy of the original instructions given, but rather the jury's demonstrated misunderstanding of those instructions. Absent a contrary showing, it is presumed that the jury understood and heeded the trial court's instructions. This presumption, however, is rebuttable. Where, as here, a jury affirmatively indicates that it has a fundamental misunderstanding of an instruction it has been given, the basis for a presumption that the jury understands the instruction disappears. . . .
>
> The People argue, and the majority in the court of appeals apparently agreed, that the trial judge's failure to answer the jury's question was appropriate since the jury could be adequately informed by directing their attention to the original instructions. . . . However, [the jury's question] . . . demonstrates that the jury had considered the relevant instruction on mental state but did not know if suspicion was encompassed within the culpable mental state described in that instruction. Referring the jury back to the same instruction that created the doubt in their minds could serve no useful purpose.

Id. at 1255 (internal quotations and citations omitted). *See also People v. Childs*, 636 N.E.2d 534, 540-41 (Ill. 1994) (even if original instruction was proper, it must not have been understood or jury would not have asked question; therefore, court erred in merely directing jury to reread instruction); *Harrington v. Beauchamps Enters.*, 761 P.2d 1022, 1025 (Ariz. 1988) (*en banc*) ("there are situations when a question from a jury so clearly demonstrates confusion on the jury's behalf that additional instructions are necessary, even though the original instructions were complete and clear"); *Potter v. United States*, 534 A.2d 943, 945-46 (D.C. 1987) (although court gave correct instruction on self-defense and counsel informed jury in closing argument that it could consider self-defense as to each count, it was reversible error for court not to answer jury's inquiry as to whether it could consider self-defense as to second count).

Because juries fail to understand straightforward instructions with alarming frequency, and because the Fourth Circuit's *per se* rule conflicts with the rule in other circuits and with the rule in the highest courts of several states, this Court should grant certiorari to decide the correct response to explicit juror misunderstanding on governing points of law.

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[9]The law firm, certain of its members, and the firm's clients also were charged with this conspiracy.

B. The Fourth Circuit's Decision Cannot Be Reconciled with This Court's Decisions in *Bollenbach*, *Boyde*, and *Buchanan* and Undermines the Eighth Amendment Principles Articulated in *Lockett* and its Progeny

The rule for more than half a century has been that when a jury instruction is facially defective and the "jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 362 U.S. 607, 612-13 (1946). There is no principled reason for applying a different rule when the jury makes explicit its inability to comprehend an instruction that lawyers and judges deem to be unambiguous. Jurors, after all, "do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Boyde*, 494 U.S. at 380-81. If the jurors don't get it, they don't get it — regardless how clear the instruction may appear to trained legal minds or even to different jurors. The Virginia Supreme Court's decision was contrary to and an unreasonable application of this Court's clearly established precedents, and the Fourth Circuit erred in upholding the state court's ruling.

This Court's more recent decisions in *Boyde* and *Buchanan* do not dilute the *Bollenbach* principle. *Boyde* and *Buchanan* both involved challenges to jury instructions that allegedly were ambiguous on their face. In neither case did the jurors request clarification or otherwise indicate that they were interpreting the instructions in a manner that precluded the consideration of mitigating evidence. In both cases, therefore, this Court was required to *predict* what reasonable jurors would infer from the language of the instructions and the context of the proceedings. Indeed, this Court indicated that the rule in *Boyde* is predicated on the absence of any overt evidence of jury misunderstanding. *See Buchanan*, 118 S. Ct. at 763 (finding no reasonable likelihood "in this context" that jury would misunderstand Virginia's pattern instruction).

Weeks' case, in contrast, did not require any court to speculate about the possibility that jurors might misunderstand the capital sentencing instruction. Weeks' jury explicitly told the trial court that some of them thought they were required to issue a death sentence as soon as they found Weeks eligible for death, without engaging in the sentence selection process and thus without considering relevant mitigating evidence in determining the appropriate punishment. (App. at 91.) There is no dispute that if even one of the jurors chose the sentence of death in such a fashion, then Weeks' rights under the Eighth and Fourteenth Amendments were violated.[10] The Fourth Circuit's insistence on disregarding the evidence of actual misunderstanding expressed in the jurors' note, and considering only what "reasonable jurors" would infer, is contrary to *Bollenbach* and unsupported by *Boyde* or *Buchanan*.

Moreover, the specific instruction in Weeks' case — as in *Boyde*, *Buchanan*, and *McDowell* — concerns the sentence selection decision in a capital case. Virginia's scheme requires jurors to consider mitigating evidence when they make the ultimate sentencing decision in a capital case. Because of this requirement, there are close parallels between *Weeks* and *Eddings*.

The trial judge in *Eddings*, like the jury in Weeks' case, erroneously believed that in making the sentence selection decision, he could not consider certain mitigating evidence as a matter of law. He put this on the record, just as Weeks' jury did in their note. Under these kinds of circumstances, this Court has declined to assume that the sentencer actually *did* consider the evidence:

> Even though the Petitioner had an opportunity to present evidence in mitigation of the crime, it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence. In any event, we may not speculate

[10]Virginia requires juror unanimity for a death sentence. If one juror does not select death as the appropriate punishment, the trial court must impose a sentence of life imprisonment. VA. CODE § 19.2-264.4 (Michie 1999 suppl.).

> as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors. . . . *Woodson* and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

Eddings, 455 U.S. at 119 (O'Connor, J., concurring). There can be no principled distinction between a judge who misinterprets a *statute* to preclude consideration of mitigating evidence and jurors who misinterpret their *instructions* to preclude the consideration of mitigating evidence. The Court should grant certiorari to reaffirm the clearly established rule in *Bollenbach*, as informed by *Boyde*, *Buchanan*, and *Eddings*.

II. THE FEDERAL COURTS OF APPEALS ARE DEEPLY DIVIDED ON WHETHER READING *AKE V. OKLAHOMA* TO PROVIDE INDIGENT CRIMINAL DEFENDANTS WITH A RIGHT OF ACCESS TO NONPSYCHIATRIC EXPERTS WOULD ANNOUNCE A NEW RULE

This Court long has acknowledged that states must afford indigent criminal defendants with a meaningful opportunity to present a defense. *See, e.g., Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956). Although the state need not purchase for an indigent defendant all of the services that the wealthy may buy, *see Ross v. Moffitt*, 417 U.S. 600 (1974), the state must provide the defendant with the "basic tools of an adequate defense." *Britt v. North Carolina*, 404 U.S. 226 (1971).

In *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985), this Court held that a psychiatric expert could constitute such a basic tool when the issue to be addressed by the psychiatrist would be a significant issue at trial or necessary to an adequate defense. Since the decision in *Ake*, the state and federal courts have been divided on whether the rule in that case is narrowly limited to the right to a psychiatrist, or if it also establishes the rule for an indigent defendant's access to other kinds of experts.

In *Weeks*, the Fourth Circuit squarely held that to apply the principles of *Ake* to nonpsychiatric experts would announce a "new rule," and thus that the antiretroactivity doctrine bars federal habeas review of Weeks' federal constitutional claim.[11] (App. at 15-18.) *See Teague v. Lane*, 489 U.S. 288 (1989). The only other court to impose this doctrinal straightjacket on *Ake* is the Ninth Circuit. The position of the Fourth and Ninth Circuits is in direct conflict with several other courts of appeals. The stance of the Fourth and Ninth Circuits also is inconsistent with the position of the highest court in every state that has directly addressed whether *Ake* establishes a federal constitutional right to nonpsychiatric experts. This Court should grant certiorari to resolve the conflict among the courts of appeals, and to provide guidance to the state courts that have not rendered an opinion about the full scope of *Ake*.

A. A Federal Court Does Not Create a New Rule When It Applies a General Rule That Was Specifically Designed for the Purpose of Evaluating a Myriad of Factual Contexts

In *Teague*, a plurality of this Court adopted the second Justice Harlan's retroactivity approach and held that a "new rule" of federal constitutional law will not be applied or announced on collateral review unless the rule falls within one of two narrow exceptions.[12] *See Teague*, 489 U.S. at 299-316

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[11]Because the new rule doctrine exists to "validate[] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to [other] decisions," *Butler v. McKellar*, 494 U.S. 407, 414 (1990), there is good cause to question the application of the doctrine in the first instance when the defendant presented the issue to the state court on direct review but that court somehow failed to address it. *Cf.*, 28 U.S.C. § 2254(d), as amended by the AEDPA (imposing limitations on federal habeas review only if claim actually "was adjudicated on the merits in State court proceedings").

[12]The first exception is for new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 311 (plurality opinion) (internal quotation marks omitted). The second exception is for "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990).

(plurality opinion). The new rule doctrine is predicated on interests of comity and the finality of criminal convictions. *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993). This principle "serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer v. Smith*, 497 U.S. 227, 231 (1990).

The Court has emphasized, however, that when a rule announced in one factual circumstance is designed to apply to diverse factual circumstances, federal courts may safely apply that rule to the kind of new facts that were within the intended scope of the original rule does not announce a new rule. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989) (emphasizing critical distinction between *extension* of existing precedent on collateral review to announce new rule, and mere *application* of existing general principle to new set of facts); *Wright v. West*, 505 U.S. 277, 309 (1992) (Kennedy, J., concurring in the judgment) (when "a rule [is] designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent"); *see also id.* at 304.

In Weeks' view, the decision in *Ake* established precisely this kind of rule. The standard announced in *Ake* was designed for evaluating myriad requests for access to experts, not merely requests for appointment of a psychiatrist. This Court likely did not, and does not, anticipate granting certiorari in dozens (if not hundreds) of cases to decide whether an indigent defendant has a constitutional right to each separate kind of expert.

B. The Decisions of the Federal Courts of Appeals Are in Conflict

The Fourth Circuit has held squarely that *Ake* did not announce a rule for courts to employ in other factual contexts and that the principles enumerated in *Ake* do not apply beyond the narrow and specific facts of *Ake*:

> We interpret *Ake* and *Caldwell* together to stand for the proposition that due process as of the time Weeks's conviction became final only required that an indigent defendant be appointed psychiatric experts when his sanity is at issue in the trial.

(App. at 17.) *See also, Gray v. Thompson*, 58 F.3d 59, 66 (4th Cir. 1995) (indigent defendant has no constitutional right of access to private investigator), *aff'd on other grounds*, 518 U.S. 152 (1996).

The Ninth Circuit shares this narrow reading of *Ake*. In *Jackson v. Ylst*, 921 F.2d 882, 885-86 (1990), the defendant claimed that he had a federal due process right to appointment of an eyewitness identification expert. The Court of Appeals concluded that such a holding "would create a 'new rule' which would 'impose[] new obligation on the [s]tates.' *Teague v. Lane*, 109 S.Ct. at 1070." *Jackson*, 921 F.2d at 886. Like the Fourth Circuit, the Ninth Circuit said that *Ake* should be limited to its factual context — i.e., that due process requires only that "a trial court must appoint a psychiatrist for an indigent if his or her sanity will 'be a significant factor at trial.'" *Id.* at 885 (citation omitted).

The Eighth Circuit has reached the opposite conclusion. In *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987) (*en banc*), a rape victim identified Little as her assailant after she was placed under hypnosis by a police officer. Little, an indigent defendant, requested the state to provide him with an expert in hypnosis so he could intelligently challenge the qualifications of the state's hypnotist and his methodology. The Missouri Supreme Court found no due process error in the denial of the expert, concluding that Little could have challenged the identification procedures by

using the library or by consulting with psychologists from a local university "at little or no expense." *Id.* at 1242 The *en banc* Eighth Circuit, relying upon this Court's decisions in *Britt, Ake*, and *Caldwell,* held that the "rule of *Ake*" applied to nonpsychiatric experts as well as psychiatrists:

> There is no principled way to distinguish between psychiatric and nonpsychiatric experts. The question in each case must be not what field of science or expert knowledge is involved, but rather how important the scientific issue is in the case, and how much help a defense expert could have given.

Id. at 1243.

The Sixth Circuit likewise concluded that the rule of *Ake* should be applied to requests for nonpsychiatric experts. Relying on this Court's decision in *Ake*, that court concluded in *Terry v. Rees,* 985 F.2d 283 (6th Cir. 1993), that the defendant "was deprived of the opportunity to present an effective defense when he was denied an independent pathologist in order to challenge the government's position as to the victim's cause of death." *Id.* at 284.

The Fifth Circuit has not directly ruled on the question but appears to have accepted the underlying premise that due process may require the appointment of nonpsychiatric experts in appropriate circumstances. Without citing *Teague*, the court said in *Yohey v. Collins,* 985 F.2d 222, 227 (5th Cir. 1993), that the trial court's denial of a request for forensic and firearms experts did not violate due process for the sole reason that the defendant failed to make the requisite showing of need; *see also Scott v. Louisiana,* 934 F.2d 631, 633 (5th Cir. 1991) (holding that state court's refusal to appoint independent firearms expert would violate due process if ballistics evidence was "critical to the conviction" and "subject to varying expert opinion").

The Tenth and Eleventh Circuits have been asked on numerous opportunities to address the issue. In *United States v. Greschner,* 802 F.2d 375, 377 (10th Cir. 1986), and *Coleman v. Brown,* 802 F.2d 1227, 1236-37 (10th Cir. 1986), the Tenth Circuit declined to decide whether the rule of

Ake applied to the defendants' requests for a penologist and a private investigator, respectively, because in each instance the defendant had failed to make the requisite showing of need. In a more recent decision, however, the Tenth Circuit has applied the rule of *Ake* beyond its specific facts. In *Dunn v. Roberts*, 963 F.2d 308 (10th Cir. 1992), the court vacated a Kansas habeas petitioner's convictions because the trial court had failed to provide funds to obtain the services of an expert in "battered woman's syndrome." *Id.* at 311-13. Although *Dunn* was not a case where petitioner's "sanity was at issue," the court concluded that the expert was nevertheless necessary to rebut the state's evidence of intent, a necessary element of the crime with which petitioner was charged. *Id.* at 313. *See also Williamson v. Reynolds*, 904 F. Supp. 1529, 1562 (E.D.Okla. 1995), *aff'd on other grounds sub nom. Williamson v. Ward,* 110 F.3d 1508 (10th Cir. 1997) (granting habeas relief because trial court failed to fund hair and serology experts where hair and semen were only physical evidence connecting defendant and co-defendant to crime).

The Eleventh Circuit, like the Tenth Circuit, has avoided resolving the question. *See Baxter v. Thomas*, 45 F.3d 1501, 1511 n.24 (11th Cir. 1995) (request for "nonpsychiatric experts"); *Stephens v. Kemp,* 846 F.2d 642, 646-47 (11th Cir. 1988) (*en banc*) (request for firearms expert); *McKinley v. Smith*, 838 F.2d 1524, 1529 & n.9 (11th Cir. 1988) (request for pathologist); *Moore v. Kemp,* 809 F.2d 702 (11th Cir. 1987) (*en banc*) (request for criminologist and other forensic experts). Although the court did not reach the issue in *Moore*, the court noted the confusion created by this Court's first footnote in *Caldwell v. Mississipi,* 472 U.S. 320 (1985):

> The Supreme Court's statement in *Caldwell* implies that the government's refusal to provide nonpsychiatric expert assistance could, in a given case, deny a defendant a fair trial. The implication is questionable, however, in light of the Court's subsequent statement that it had "no need to determine as a matter of federal constitutional law what *if any* showing would have entitled a defendant to assistance of the type [Caldwell] sought." *Id.* (emphasis added). We nonetheless assume, for

> sake of argument, that the due process clause could require the government, both state and federal, to provide nonpsychiatric expert assistance to an indigent defendant upon a showing of need.

Moore, 809 F.2d at 711. In this *en banc* decision, five judges wrote separately to emphasize that the constitution should only require the appointment of nonpsychiatric experts when such assistance is "vital to the resolution of the issues":

> Absent further direction from the Supreme Court, I am convinced that unless non-psychiatric expert assistance is, because of the nature of the issue on which it is sought, as vital to the resolution of the issues as psychiatric assistance was in *Ake*, the Constitution does not require that it be provided in a criminal trial.

Id. at 737 (Hill, J., concurring in part and dissenting in part). Six other members of the court wrote separately, expressing their views that this Court's decision in *Ake* molded an "elastic rule" that should be logically and appropriately applied to requests for nonpsychiatric experts when the facts of a particular case warrant it:

> *Caldwell*, read in conjunction with *Ake*, teaches us several things. First, it reaffirms that the obvious object of the Court's reticence in *Ake* was the need for flexible decision making tailored to the facts of a given case. Capital cases do not lend themselves to rigid, ritualistic formulae. Second, it belied the state's suggestion that *Ake* must be read narrowly and confined to its facts. *Caldwell's* footnote 1 suggests that the Court was willing to entertain extending *Ake* in the fashion Moore requests today. Rather than rejecting the claim out of hand as inappropriately stretching *Ake* to a different question, the Court refused to grant relief only because Caldwell failed to make a showing of sufficient need under *Ake's* flexible standard.

Id. at 741 (Johnson, J., concurring in part and dissenting in part). The Fourth Circuit, unlike Judge Johnson and his colleagues, reads the *Caldwell* footnote as suggesting that the Court has *not* been willing to read *Ake* as applying to experts other than psychiatrists. *See Gray*, 58 F.3d at 66-67.

The foregoing cases demonstrate that there is a conflict among the courts of appeals as to whether or not the rule of *Ake* applies to requests for nonpsychiatric experts and therefore whether recognition of such a right would announce a new rule. The breadth of the conflict also shows that

this Court's dicta in the first footnote of *Caldwell* has been a source of confusion among the lower courts. The Court should grant certiorari both to resolve the conflict, and to clear away any uncertainty created by its footnote in *Caldwell*.

C. The Fourth Circuit's Narrow Reading of *Ake* is Contrary to the Decisions of the Highest Courts of Every State That Has Squarely Addressed the Issue and Fails to Accord Appropriate Deference to the Virginia Supreme Court

The Fourth Circuit's conclusion that *Ake* is limited to the appointment of a psychiatrist is at odds with the decisions of the highest court in every state that has considered the issue. *See Dubose v. State*, 662 So.2d 1189, 1194 (Ala. 1995) (holding that *Ake* establishes right to appointment of nonpsychiatric experts, including DNA experts); *Ex parte Moody*, 684 So.2d 114, 119 (Ala. 1996) (*Ake* extends to firearms experts and other experts necessary to defense); *Thornton v. State*, 339 S.E.2d 240, 241 (Ga. 1986) (allowing appointment of dental expert where impressions of defendant's teeth were only link between defendant and homicide and issue was subject to varying expert opinions); *Bright v. State*, 455 S.E.2d 37, 47 (Ga. 1995) (due process principles of *Ake* apply when assessing indigent defendant's request for nonpsychiatric experts), *cert. denied*, 516 U.S. 872 (1995); *Tatum v. State* 380 S.E.2d 253 (Ga. 1989) (firearms expert); *People v. Lawson*, 644 N.E.2d 1172, 1188-89 (Ill. 1994) (acknowledging federal due process basis, as well as state constitutional basis, for defendant's request for fingerprint and shoeprint experts); *State v. Coker*, 412 N.W.2d 589, 592-93 (Iowa 1987) (finding defendant entitled to intoxication expert where criminal responsibility at the time of offense was significant issue); *State v. Craig*, 637 So.2d 437 (La. 1994) (having made requisite showing of necessity under *Britt*, *Caldwell*, and *Ake*, parish could be ordered to fund experts and investigators in capital cases); *Polk v. State*, 612 So.2d 381 (Miss. 1992) (applying reasoning of *Ake* to hold that due process considerations require defendant to have access to DNA

expert); *Harrison v. State*, 635 So.2d 894 (Miss. 1994) (holding that *Ake* required appointment of pathologist to assist defendant); *State v. Bridges*, 385 S.E.2d 337 (N.C. 1989) (under *Ake* and *Caldwell*, defendant was entitled to fingerprint expert); *State v. Coffey*, 389 S.E.2d 48 (N.C. 1990) (hair and fiber analysis); *In re Allen R.*, 506 A.2d 329 (N.H. 1986)(Souter, J.) (*Ake* applied to request for psychologist to render opinion regarding juvenile's understanding of *Miranda* warnings); *Rogers v. State*, 890 P.2d 959, 966-67 (Okla..Crim. App. 1995) ("the principles of *Ake* have been extended to any expert necessary for adequate defense"); *Bailey v. State* 424 S.E.2d 503, 505 (S.C. 1992) (holding that statue which fails to provide that court-appointed defense counsel in capital cases be compensated for expenses, including experts and investigators, violates constitution); *State v. Stuck*, 434 N.W.2d 43, 51 (S.D. 1988) (defendant entitled to fingerprint expert under *Caldwell* if he makes sufficient showing of need); *Rey v. State*, 897 S.W.2d 333, 337-38 (Tex. Crim. App. 1995) ("*Ake* is not limited to psychiatric experts").[13]

For purposes of the new rule doctrine, what is significant about these state court decisions is not just that they unanimously interpret *Ake* as applying to nonpsychiatric experts, but also that nearly all of them were decided *before* Weeks' conviction became final. The legal landscape at the

[13]Numerous other state courts appear to have assumed that *Ake* applies to other types of experts because they entertained defendants' *Ake* claims with respect to the appointment of a variety of types of experts, but rejected those claims for other reasons. *See, e.g., State v. Gordius*, 544 A.2d 309, 311 (Me. 1988) (rejecting request for expert to testify to accuracy of child's recollection because defendant did not demonstrate that expert's opinion was beyond common knowledge); *Hough v. State*, 560 N.E.2d 511, 516 (Ind. 1990) (denying request for firearms expert because defendant failed to show need); *State v. Edwards*, 868 S.W.2d 682, 697-98 (Tenn. Crim. App.1993) (finding defendant was not entitled to DNA expert when he failed to meet minimum requirement for threshold showing of need); *Davis v. State*, 863 S.W.2d 259, 266 (Ark. 1993) (holding that defendant was not entitled to firearms expert because he failed to make specific showing of need), *cert. denied*, 511 U.S. 1026 (1994); *State v. Volker*, 477 N.W.2d 909 (Minn. App. 1991) (*Ake* applies to request for expert evaluation of breath alcohol analyzer but defendant failed to make threshold showing).

time of Weeks' case included all but one of these state court decisions. Existing precedent did not include then, as it does not include now, *any* decision of the highest court of a state holding that federal due process entitles an indigent defendant to a psychiatrist but not to any other kind of expert.

Moreover, as Weeks has explained *supra*, if the Virginia Supreme Court had addressed this issue when Weeks presented it on direct review, the state court undoubtedly would have held that Weeks was constitutionally entitled to nonpsychiatric experts. The year after Weeks' conviction became final, the state's highest court confirmed in another case that:

> *Ake* [*v. Oklahoma*, 470 U.S. 68 (1985)] and *Caldwell* [*v. Mississippi*, 472 U.S. 320 (1985)], when read together, require that the Commonwealth of Virginia, upon request, provide indigent defendants with "the basic tools of an adequate defense," *Ake*, 470 U.S. at 77, and, that in certain instances, these tools may include the appointment of non-psychiatric experts.

Husske v. Commonwealth, 476 S.E.2d 920, 925 (Va. 1996), *cert. denied*, 519 U.S. 1154 (1997). In reaching this conclusion, the Virginia Supreme Court surveyed the legal landscape and relied upon the very state and federal cases that Weeks has cited above. *Id.*

"At bottom . . . , the *Teague* doctrine 'validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.'" *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997) (quoting *Butler v. McKellar*, 494 U.S. 406, 414 (1990)). "The purpose [of the new rule doctrine] is to determine whether application of a new rule would upset a conviction that was obtained in accordance with the constitutional interpretations existing at the time of the prisoner's conviction." *Wright*, 505 U.S. at 307 (Kennedy, J., concurring in the judgment). In light of the Virginia Supreme Court's interpretation of *Ake* and *Caldwell* in *Husske*, the Fourth Circuit appears to have turned the *Teague* doctrine on its head. Rather than deferring to the Virginia Supreme Court's good-faith interpretation of *Ake*, which was

based on the legal landscape that existed at the time Weeks' conviction became final and which the state court undoubtedly would have invoked if it had addressed the issue in Weeks' case, the Fourth Circuit substituted its own narrow interpretation of this Court's precedents and imposed it on the state court. The Fourth Circuit justified this action by indicating, without basis, that the state court's decision in *Husske* was merely discretionary rather than compelled. (App. at 17-18.)

This Court should grant certiorari to consider whether, under the new rule doctrine, a federal court may impose its own view that a particular rule was not *compelled* by precedent despite compelling evidence that the state court would have reached the opposite conclusion based on the legal landscape that existed at the time the defendant's conviction became final.

D. The Right to Nonpsychiatric Experts Comes Within the "Watershed" Exception to the Antiretroactivity Doctrine

Federal habeas courts are not barred from announcing new "'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" *Graham v. Collins*, 506 U.S. 461, 478 (1993) (quoting *Teague*, 489 U. S. at 311). The Fourth Circuit held that the rule Weeks sought to apply did not come within this "watershed" exception.

The right to counsel articulated in *Gideon v. Wainwright*, 372 U.S. 335 (1963), is the most commonly cited example of a rule so fundamental that it would fit the "watershed" category. An indigent defendant's right of access to nonpsychiatric experts is very similar to the right to counsel established in *Gideon*. Just as an ordinary individual cannot intelligently investigate and present a defense to a criminal charge without the assistance of an expert in the substantive and procedural law, neither the defendant nor his counsel can intelligently investigate and present a defense to the state's forensic evidence without the assistance of a person with appropriate expertise. Few criminal defense lawyers are also experts in pathology or toolmarks or molecular genetics or metallurgy or

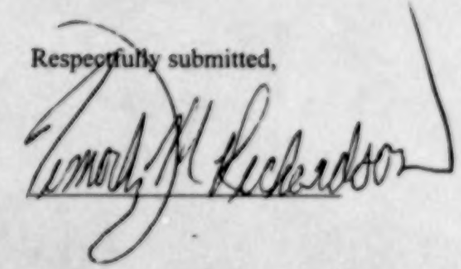
poison chemistry or any of the myriad other technical subjects that may arise in a criminal prosecution. Experts in all of these areas are freely available to the prosecution from state crime labs, the FBI, and specialized laboratories, and thus may appear in any criminal prosecution.

Furthermore, as Weeks argued below, to hold that indigent criminal defendants have a federal constitutional right to the appointment of a psychiatrist in appropriate circumstances but do not have a corresponding right to appointment of a nonpsychiatric expert would be fundamentally unfair. Therefore, the Court should grant certiorari to determine whether an indigent defendant's right of access to nonpsychiatric experts comes with the "watershed" exception to *Teague*.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari on each of Weeks' questions presented.

Respectfully submitted,



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